

The following decision has been edited to preserve the confidentiality of the parties involved.

The following decision is a *Police Act* matter that was originally investigated by the Professional Standards Section of the Vancouver Police Department. After reviewing the investigation, the Police Complaint Commissioner ordered a new investigation be conducted by an external police agency (the Abbotsford Police Department). Chief Constable Chu delegated his role of Discipline Authority to the Inspector in charge of Professional Standards. After reviewing the external investigation, the Discipline Authority determined that the evidence supported the substantiation of one allegation, but not the remaining allegation. The Police Complaint Commissioner disagreed with the finding and appointed a retired judge to independently review the unsubstantiated allegation. The following is the decision by the Honourable Mr. Justice Ian Pitfield (ret'd), dated August 11th, 2010.

**IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367
AND
IN THE MATTER OF CONSTABLE (Name Withheld)**

NOTICE OF DISCIPLINE AUTHORITY'S DECISION

TO: "The Member" Member
AND TO: "The Complainant" Complainant
AND TO: "The Investigator" External Investigator
AND TO: Mr. Stan Lowe Police Complaint Commissioner

Overview

[1] Two incidents of misconduct are alleged against (*the Member*), namely:

On June 21, 2009, while off duty, he operated a motor vehicle while his ability to do so was affected by alcohol for which he received a 24-hour roadside driving suspension; and

On June 21, 2009, he displayed his police badge in order to gain favour from RCMP Corporal (*edited*) while stopped at a sobriety roadblock.

[2] On December 2, 2009, the Police Complaint Commissioner (the "Commissioner") referred the allegations to "*the External Investigator*" of the Abbotsford Police Department (the "Investigator") for investigation as permitted by s. 92 of the *Police Act*. On June 7, 2010, the Investigator submitted a report on his findings to the Commissioner. The Investigator stated that as a result of his assessment of the evidence and analysis of the facts, he had concluded that each of the allegations appeared to have been substantiated.

[3] The Commissioner referred the Investigator's report to the Chief Constable, Vancouver Police Department, who was, at the time, the discipline authority in relation to the allegations. The Chief Constable delegated responsibility for the review of the Investigator's report and findings, determination of the question whether either or both of the allegations appeared to have been substantiated, and identification of an appropriate sanction in the event of substantiation, to Inspector Cumberworth of the Vancouver Police Department. The discipline authority concluded that the allegation pertaining to the operation of a motor vehicle appeared to have been substantiated, but that pertaining to the display of the police badge had not. A notice of decision was issued on June 10, 2010.

[4] The Commissioner reviewed the discipline authority's decision and, as permitted by s. 117(1) of the *Police Act*, considered that there was a reasonable basis to believe that the decision in relation to the second allegation was incorrect. As a consequence, the Commissioner consulted with the Associate Chief Justice of the Supreme Court of British Columbia with a view to the appointment of a retired judge as a "new discipline authority". On August 4, 2010, the Commissioner provided notice that the writer, Ian H. Pitfield, a retired judge of the Supreme Court of British Columbia, had been appointed as the new discipline authority with the responsibilities enumerated in s. 117(3) of the *Police Act*:

To review the investigating officer's report and the evidence and records referenced in that report;

To make his own decision on the matter; and

If the conduct complained of appears to constitute misconduct, to exercise the powers and perform the duties of discipline authority in respect of the matter.

[5] The materials were sent to me electronically on August 4th. Hard copies were provided on August 7th. Notification of the next steps to be taken must be provided within 10 business days or not later than August 20, 2010.

The Investigator's Findings

(a) Operation of a Motor Vehicle

[6] (*The Investigator*) was of the view that the fact that (*the Member*), when off duty, had operated a motor vehicle while his ability to do so was affected by alcohol, appeared to constitute discreditable conduct within the meaning of s. 77(3)(h) of the *Police Act*. Strictly speaking, the same conclusion reached by Inspector Cumberworth is not relevant to my review which is to reflect my decision. I am not charged with the task and do not face the limits that a judge would face in the course of either a judicial review under the *Judicial Review Procedure Act*, or an appeal from a court of first instance. However, in the context of misconduct generally and the conclusion I have reached in relation to the allegation regarding the improper display of a police badge, and because of the relationship of the first allegation to the second, a brief review of the Investigator's findings in respect of the driving allegation is warranted.

[7] On June 21, 2009, (*the Member*), who was off duty, was operating a motor vehicle southbound on Highway 99 at 0020 hours. He was returning to (*edited*) with his partner, Ms. (*edited*). They had been in Vancouver for a concert. (*The Member*) had consumed alcohol with dinner, at the concert, and after the concert. (*The Member*) left Highway 99 at Exit 32 where he encountered a sobriety roadblock. RCMP Corporal (*edited*) approached the

(*The Member's*) vehicle, detected a mild odour of alcohol, and asked the driver if he had been consumed any alcohol that evening. The occurrence report records the following:

Sobriety roadblock at a strategic time/place on the 32 Ave ramp from Hwy 99 (south). Two occupants in the veh. Moderate smell of alcohol on driver's breath was immediate and suspicious. Inculpatory declaration of alcohol approx 1.5 hours ago at a restaurant. Eyes seemed watery. Sense of anxiety detected about the driver.

[8] (*The Member*) was required to submit to a roadside screening test. The instrument registered a "warn" reading suggesting a blood alcohol level of 50 to 99 mgs. of alcohol per 100 mls. of blood. Corporal (*edited*) issued a 24-hour roadside driving suspension and gave (*The Member*) the choice of having his passenger drive home or having the vehicle impounded. Ms. (*edited*) declined to drive. The vehicle was impounded and (*The Member*) and Ms. (*edited*) proceeded home by taxi.

(b) *Use and Display of Police Badge*

[9] Corporal (*edited*) provided a statement to the Investigator saying that:

I noticed that a 'silver badge' in a simple black wallet was open on his lap. I took exception to such an initial display of his off-duty status. (*The Member*) didn't say that he was 'VPD' or that he was an off-duty police officer.

[10] In an interview with the Investigator, Corporal (*edited*) stated he first noticed the police badge displayed in an open wallet in plain view on the driver's lap before he asked for production of a driver's licence. When asked, (*The Member*) reached down to the wallet to retrieve the licence. The licence was not already in his hand. Corporal (*edited*) stated that (*The Member*) had been professional throughout and other than display his badge, he did not try to dissuade the corporal from administering the roadside test or ask for any favours. The conversation regarding (*The Member's*) status as a member of the Vancouver Police Department did not take place until the roadside screen had been completed.

[11] Ms. (edited) was interviewed by Sergeant (edited) of the Vancouver Police Professional Standards Section, in the presence of Sergeant (edited), a representative of the Vancouver Police Union.¹ She provided the following evidence in relation to the allegation regarding the display of the police badge:

She did not discuss the use of the police badge with (*The Member*) before he placed it on his lap;

She said that he opened the wallet to get his licence and showed the badge to the officer without saying anything;

The officer noticed that (*The Member*) had a badge and started chatting with him about the VPD and members they knew; and

The officer was the one who raised the fact that (*The Member*) was a police officer.

[12] (*The Member*) provided a "duty statement" to Sergeant (edited) of the Vancouver Police Department, the material aspects of which are the following:

He consumed alcohol during the concert;

He had an additional drink prior to driving home;

While answering questions from the officer at the roadblock, he displayed his police badge on his lap;

He always displayed his police badge whenever he was stopped by other officers while off duty. He did so in order to put the officer at ease and to assure the officer he was not dealing with a threat.

He was in complete shock at the "warn" reading because it had been approximately 40 minutes from his last drink and he had consumed a small amount of alcohol over approximately four hours.

He was not trying to gain any favouritism by displaying the badge because he believed he would pass the screening test;

Upon receipt of the roadside suspension he told the officer that he "was just doing his job".

Analysis

[13] The issue before me is whether or not the evidence accumulated by the Investigator supports the finding that either or both of the operation of a motor vehicle by (*The Member*) when his blood alcohol level resulted in a roadside

¹ Corrigendum, dated September 28th, 2010

screening device reading at the “warn” level, namely between 50 mgs. and 99 mg of alcohol per 100 mls. of blood and a 24-hour roadside suspension, and the manner of display of his police badge when stopped at the sobriety roadblock constitutes misconduct on the part of (*The Member*) for which he is subject to any of the disciplinary or corrective measures stipulated in s. 126 of the *Police Act*.

[14] As I have previously stated, my task is not to consider or review the opinion of the Investigator or the original discipline authority in relation to the appearance of misconduct, but to consider the evidence assembled in the course of the investigation in the context of the relevant provisions of the *Police Act*, and to decide whether misconduct appears to have been substantiated on the balance of probabilities.

[15] “Misconduct” is defined by s. 77 of the *Police Act* and includes a “disciplinary breach of public trust” as defined by s. 77(3). Such breaches include “corrupt practice” and “discreditable conduct” as defined in s. 77(3)(c) and (h):

(3)(c) “corrupt practice”, which is

- (i) without lawful excuse, failing to make a prompt and true return of, or misappropriating, any money or property received in the performance of duties as as member,
- (ii) agreeing or allowing to be under a pecuniary or other obligation to any person in a manner that would likely be seen to affect the member’s ability to properly perform the duties of a member,
- (iii) using or attempting to use one’s position as a member for personal gain or other purposes unrelated to the proper performance of duties as a member, or
- (iv) using or attempting to use any equipment or facilities of a municipal police department, or any other police force or law enforcement agency, for purpose unrelated to the performance of duties as a member.

(3)(d) “discreditable conduct”, which is, when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:

- (i) acting in a disorderly manner that is prejudicial to the maintenance of discipline in the municipal police department.

(a) *The Driving Allegation*

[16] It is readily apparent that the operation of a motor vehicle in circumstances which resulted in a 24-hour roadside suspension will only constitute misconduct if it amounts to discreditable conduct. It appears to me that it does.

[17] In *Mancini v. Constable Martin Courage*, OCCPS #04-09, the Ontario Civilian Commission on Police Services adopted the following definition of discreditable conduct:

The concept of discreditable conduct covers a wide range of potential behaviours. The test to be applied is primarily an objective one. The conduct in question must be measured against the reasonable expectation of the community.

[18] While I am not bound by the view of the Ontario Commission, I do agree that the test was fairly stated in *Mancini* and appropriate in the context of the *Police Act*.

[19] I would adopt the reasoning of the Investigator who addressed the question of community expectations in the following terms:

The question then is, "What is the reasonable expectation of the community as it relates to police officers who drink and drive to the extent that they have their driver's license suspended for 24 hours?"

Given the negative impact of drinking and driving on our society and the ongoing high profile efforts to deal with the problem I believe that the "reasonable expectations of the community" are that police officers should not consume alcohol and drive a motor vehicle at a level that results in the suspension of their driving privileges.

[20] The community expectation that police officers who, when on duty, are engaged in the diligent detection and sanction of citizens who inappropriately drink and drive will themselves refrain, when off duty, from breaching the very laws they enforce, is reasonable. The omission to respect that expectation is discreditable conduct within the meaning of s. 77(3)(h) of the *Police Act*. As a result, I find that (*The Member*) appears to have engaged in discreditable conduct which constituted

misconduct when he operated a motor vehicle in circumstances which resulted in the imposition of a 24-hour roadside suspension.

(b) *Display of Police Badge*

[21] The evidence persuades me, and I find, that (*The Member*) displayed his police badge as he did in the hope that he would be afforded leniency or treatment that would not be afforded a citizen who was not a member of a police department.

[22] The badge was in plain view on his lap when (*The Member*) was first approached by Corporal (*edited*). There was no need for (*The Member*) to display anything given his stated belief that he had no reason to be concerned that alcohol had affected his ability to drive to an unacceptable degree. I must also note that (*The Member*) was not completely forthright in his description of his drinking on the evening of June 20th. He had consumed alcohol at dinner prior to the concert. The period of consumption extended beyond the four hours suggested by him.

[23] On (*The Member's*) own evidence, the display of the badge was not inadvertent, as might have been the case had (*The Member*) opened his wallet to retrieve his licence when asked by an officer to do so whereupon display of the badge might not have been avoided. In relation to the question of inadvertence, I see no reason to reject the evidence of Corporal (*edited*) that when he asked (*The Member*) to produce a driver's licence, the constable had to retrieve it from his wallet. It was not already in hand. The badge, however, was clearly visible on (*The Member's*) lap from the outset.

[24] I do not accept (*The Member's*) explanation that he was doing as he always did when stopped by police, namely, letting another officer know that he was a police officer who did not constitute a threat to the officer on duty. In ordinary circumstances, communication of the fact that a driver who is stopped by police at a roadblock does not pose a threat to them is unnecessary. Should communication of one's status be necessary, one would expect such knowledge to be imparted orally

and with the voluntary and obvious presentation of the police badge to the officer for inspection.

[25] The explanation is not aided by *(The Member's)* statement that displaying the badge is his practice when stopped by police. The statement suggests that he has been stopped on some ground on another occasion or occasions. In the absence of elaboration on the circumstances in which he was stopped by on-duty officers on other occasions so that he was required to identify his status as a police officer, I regard the explanation to be facile and unreliable.

[26] I conclude that there is little room for doubt that *(The Member)* displayed the badge in the manner he did hoping that it would influence the conduct of the on-duty officer. The issue is whether his actions constitute either a corrupt practice or discreditable conduct.

[27] While s. 77(3)(c) is broadly worded and includes within the purview of a corrupt practice the use or attempted use of one's position as a member of a police force for personal gain or other purpose unrelated to the proper performance of duties as a member, I am not persuaded that the actions of *(The Member)* in this case should be regarded as such. This was not a use of police status to *compel* action on the part of anyone in return for advantage to *(The Member)* and in that regard is unlike, by way of contrast, the use of police status to gain entry to premises or access to property for the personal benefit of an officer. Nor was it was conduct by which favouritism would be afforded *(The Member)* in exchange for a benefit conferred upon Corporal *(edited)*. In my judgment there was an insufficient lack of probity or malevolence to permit *(The Member's)* conduct to be described as a corrupt practice within the meaning of the *Police Act*.

[28] The real question in this instance is whether the purpose for the display of the police badge as evidenced by the manner of display appears to constitute discreditable conduct. I am persuaded that it does.

[29] I do not accord any weight to the evidence of Corporal (*edited*) with respect to his opinion of the reason for which (*The Member*) displayed the badge. I do accord weight to the corporal's description of the manner in which the badge was displayed as that is relevant to the assessment of (*The Member's*) conduct and intention in acting as he did. The test in respect of discreditable conduct is objective. What is material is not what Corporal (*edited*) perceived to be (*The Member's*) intention. Rather, the material point is the inference one draws with respect the purpose of (*The Member's*) actions having regard for the objective evidence of what was done. Having done so, the question is whether what was done and the reason for doing it corresponds to the community's expectation regarding the conduct of an off-duty police officer.

[30] As I have stated, I have concluded that the objective evidence permits of only one conclusion: (*The Member*) displayed his badge as he did for the purpose of gaining favourable treatment from Corporal (*edited*). I am satisfied that the reasonable community expectation is that an off-duty police officer will be accorded the same treatment and subject to the same sanctions as any other citizen. The community will not accept a double standard of law enforcement. The actions of (*The Member*) which were undertaken for the purpose of procuring more favourable treatment than would be accorded others appears to me to constitute discreditable conduct. The finding that conduct is not corrupt does not mean it is not discreditable. While corrupt conduct is discreditable, the converse need not be true. Whether there is a difference in any particular case will depend upon one's assessment of the circumstances. In this case the circumstances point to discreditable conduct that does not amount to corruption.

[31] I conclude that the allegation that (*The Member's*) use of his police badge in this instance amounted to misconduct appears to be well-founded and to have been substantiated by the evidence.

Notice of Next Steps

[32] As required by s. 117(8) of the *Police Act*, I hereby provide notice to (*The Member*) as follows:

- (a) For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation that the operation of a motor vehicle by (*The Member*) on June 21, 2009, in circumstances that resulted in the imposition of a 24-hour roadside suspension constitutes misconduct and requires the taking of disciplinary or corrective measures;
- (b) For the reasons set forth herein, the evidence referenced in the investigation report appears sufficient to substantiate the allegation that the display and manner of display by (*The Member*) of his police badge upon being stopped by Royal Canadian Mounted Police at a roadside sobriety checkpoint on June 21, 2009 constitutes misconduct and requires the taking of disciplinary or corrective measures;
- (c) A prehearing conference will be offered to (*The Member*);
- (d) (*The Member*) has the right pursuant to s. 119 to request permission to call, examine or cross-examine witnesses at the discipline proceeding, provided such request is submitted in writing within 10 business days following receipt of this notice of decision.
- (e) The range of disciplinary or corrective measures being considered include:
 - a. Requiring (*The Member*) to undertake or retake training in police and community morality and ethics;
 - b. Reprimanding (*The Member*) in writing;
 - c. Reprimanding (*The Member*) verbally; and
 - d. Giving (*The Member*) advice as to his conduct.

[33] I hereby notify Corporal (*edited*), the complainant in this instance, of his right pursuant to s. 113(1) of the *Police Act* to make submissions at the discipline proceeding with respect to the complaint, the adequacy of the investigation, or the disciplinary or corrective measures that would be appropriate.

Dated at Vancouver, British Columbia this "11th" day of August, 2010.

"Ian H. Pitfield"

Hon. Ian H. Pitfield, Discipline Authority

A prehearing conference was held on September 23rd, 2010, at which time the Member accepted responsibility for his actions and agreed to the following disciplinary measures:

Allegation 1: Discreditable Conduct (24 hr suspension)
Written Reprimand

Allegation 2: Discreditable Conduct (displaying badge)
Advice to Future Conduct

The OPCC reviewed the matter and agreed to the resolution reached at the prehearing conference and concluded the file on September 28th, 2010.